

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
WESTERN DIVISION**

CHARLES L. HOBBS,  
Plaintiff,

No. C01-4055-PAZ

vs.

**MEMORANDUM OPINION AND ORDER**

JO ANNE B. BARNHART, Commissioner of Social  
Security,  
Defendant.

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##### ***I. INTRODUCTION***

The plaintiff Charles L. Hobbs ("Hobbs") appeals the decision by an administrative law judge ("ALJ") denying him Title II disability insurance ("DI") benefits and Title XVI supplemental security income ("SSI") benefits. Hobbs alleges he is disabled due to "[c]oronary heart disease (with history of myocardial [sic] infraction [sic] and bypass surgery), arthritis in right hip and right ankle, right lung is partially collapsed with resultant shortness of breath, depression, obesity (260 lbs. at 5'11"), peptic ulcer, alcoholic (not drinking currently), [and] dizziness." (R. 242) Hobbs argues the ALJ erred in rejecting his subjective complaints of pain and limitations, and the ALJ relied upon an improper hypothetical question posed to the vocational expert. (Doc. No. 8, unnumbered p. 3)

##### ***II. PROCEDURAL AND FACTUAL BACKGROUND***

###### ***A. Procedural Background***

Hobbs filed an application for SSI and DI benefits on March 11, 1993, alleging a disability onset date of December 31, 1986. (R. 14, 72-74) The applications were denied on July 22, 1993. (R. 14, 65-71) Hobbs did not seek reconsideration. (R. 14) Hobbs filed a second application on March 27, 1996, again alleging a disability onset date of December 31, 1986. (R. 14, 233-35) The application was denied initially on May 20, 1996 (R. 14, 219, 221-24), and on reconsideration on July 2, 1996 (R. 14, 220, 227-30). Hobbs requested a hearing (R. 231, 271-72), which was held on November 19, 1997, in Dakota Plains, Iowa, before ALJ J.M. Johnson. (R. 37-64) Attorney William L. Forker represented Hobbs at the hearing. Hobbs testified in his own behalf, and Vocational Expert ("VE") Jack Reynolds also testified at the hearing. On January 21, 1998, the ALJ issued his opinion denying Hobbs's claim for benefits. (R. 11-25) The Appeals Council of the Social Security Administration denied Hobbs's request for review on April 11, 2001 (R. 6-8), making the ALJ's decision the final decision of the Commissioner.

Hobbs filed a timely Complaint in this court on May 31, 2001, seeking judicial review of the Commissioner's ruling. (Doc. No. 1) The parties consented to jurisdiction of this case by a United States Magistrate Judge, and on July 6, 2001, the Honorable Donald E. O'Brien transferred the case to the undersigned for further proceedings and the entry of judgment. (Doc. No. 3) Hobbs filed a brief in support of his appeal on October 11, 2001 (Doc. No. 8), and the Commissioner filed a responsive brief on November 29, 2001 (Doc. No. 9). The court now deems this matter fully submitted, and pursuant to 42 U.S.C. § 405(g), turns to a review of Hobbs's claim for benefits.

###### ***B. Factual Background***

### ***1. Introductory facts and Hobbs's daily activities***

At the time of the hearing, Hobbs was fifty-nine years old, 5'11" tall, and weighed 256 pounds. He stated he had gained 50 pounds since he had bypass surgery in 1986. He has weighed as much as 276 pounds. He took Redux for three months and lost 30 pounds, but then the drug was taken off the market. Hobbs said his weight has been a continuing problem, and is not good for his heart condition. (R. 40-41)

Hobbs lives in Ottawa, Iowa. He attended college for one year. (R. 40) From 1981 to 1985, Hobbs worked as a franchise salesman for Jiffy Lube, where he would meet potential franchisees and open new franchises. (R. 41) In 1985, he was sent to Las Vegas "to take over and manage a Jiffy Lube that was having some financial problems." (*Id.*) At one time, Hobbs owned five Jiffy Lube stores in South Carolina. He bought the stores in about May of 1986, and sold them in December 1986 or January 1987, because he developed health problems that made it difficult for him to cope with five stores and 26 employees. (R. 42) Hobbs stated he had his first heart attack when he was 37 years old, and even though he had employees who did all the work, it was too stressful for him to continue managing the stores due to his health conditions. (R. 42-43) Hobbs has not worked at all since he sold his Jiffy Lube stores. (R. 43) He received income of \$102,000 a year from the stores up until March of 1992. (R. 54) To Hobbs's recollection, the only income he has had since March 1992, was when he went back to work for Jiffy Lube for three or four weeks at one point. (R. 55) He was unable to continue working due to his health. (*See* Work Activity Report, R. 90-93)

For the last ten years, Hobbs has lived alone in a house his mother owns, and his mother has been supporting him. He has borrowed money from his brother-in-law. His son also helps contribute to his support. (R. 43) He does not smoke; he stopped smoking on February 22, 1986. (R. 58) He has not had a drink in 13 years.

Since his first heart attack at age 37, Hobbs has had other heart attacks. The worst one was in February 1986, while he was driving to Las Vegas, where he was living at the time. He had surgery on his heart following the attack. He has not had further heart attacks, but he suffers from "a lot of angina pain." (R. 43-44) Hobbs sees his family doctor, Dr. Garred, and also a Dr. Pagano in Omaha. Hobbs described his current treatment for his heart as follows:

[The doctor] stepped up my dosage of Tenormine (Phonetic) two weeks ago to see if he can't relieve the angina pain, and, he's got me on Procananite (Phonetic) to regulate the rhythm of my heart. Other than that he wouldn't - he wouldn't put me on a treadmill the other day to, you know, to exert my heart. But, I guess that's about the only thing. He told me, you know, not to be a couch potato but not to over exert myself either.

(R. 44) He stated the Tenormine helps the pain, but it makes him a little nauseous and dizzy. (R. 53) Hobbs's course of treatment basically has been the same for the past ten years, although his medications have changed from time to time as new drugs have come out. Hobbs carries nitroglycerine with him all the time, to take whenever he has angina pain. However, the nitroglycerine gives him terrible headaches, so he only takes it when he has severe pain. He reported taking nitroglycerine two times in the two weeks prior to the hearing, but his average is about once per month. (R. 44-45)

Hobbs said certain activities bring on his angina attacks. He walked on a treadmill for about ten years,

but he stopped because it was causing angina. The same is true for most other forms of exercise. (R. 46)

Hobbs was diagnosed with degenerative arthritis in his hip ten to fifteen years ago., which he describes as "very, very painful." (*Id.*) It bothers him when he walks and when he sits, and "aches like you've got a toothache in your hip." (*Id.*) He is unable to walk or stand on concrete for very long before he has to sit down. (*Id.*) Hobbs has never had physical therapy or surgery on his hip, and he does not use a cane, brace or corset. He wears magnets around his waist, which helps "to a certain degree." (R. 57-58)

Hobbs stated he is unable to stand long enough to brush his teeth, so he brushes his teeth while sitting on the toilet seat. (R. 47-48) He is unable to walk from one end of a shopping mall to the other. His hip bothers him when he walks on concrete surfaces, and all the Jiffy Lubes had concrete floors. (R. 48) Hobbs described his usual routine when he was working at the Jiffy Lubes:

I would go out with my operations man and inspect the Jiffy Lubes. I had, you know, there were probably 50 to 60 miles apart from - the two furthest ones were probably that far apart and I'd go out and inspect those with him just to make sure that he was doing his job, and, I had a desk, I had an office, I had a secretary. It was mostly - most of my work was done, you know, just checking on my employees. I couldn't, you know, a half hour of sitting in one place [and] I'd have to get up and walk, and, then I'd walk so far that I couldn't walk anymore so I'd have to go sit again. It's even hard to lay down without, you know, getting up in the middle of the night walking around because you get, you know, you get pain so you got to walk it off.

(R. 48)

Hobbs stated he had problems because of the stress factors involved in running the business. (R. 48-49) He had someone else drive him around because he was more comfortable when he could lean his seat back. He did no heavy lifting, stating a briefcase was probably the heaviest thing he lifted. (R. 49)

Hobbs has "been a bachelor for a long, long time." (R. 50) He does not cook much and eats most of his meals out. (He is supposed to be on a special diet, but he has not stayed on the diet. R. 59) He has employed a housekeeper ever since his divorce, and he stated, "It's tough for me to push a vacuum cleaner. It's not hard to run around the house with a feather duster, but vacuuming is probably the toughest thing." (R. 50) He washes his own clothes, but hires someone to do his yard work. He can ride a riding lawn mower but cannot "do the weedeating and the trimming of trees, and, the things that needed to be done." (*Id.*) Hobbs's mother pays his housekeeper and the yard keeper. She has given him "in excess of \$40,000" in the past year. (R. 57) The money will be deducted from Hobbs's share of his mother's estate when she dies. (*Id.*)

Hobbs's primary recreational activity is playing golf. In the summer, or for about six months out of the year, he will play golf an average of five times per week. He uses a golf cart because he is unable to walk the distance of even one hole. (R. 51) Hobbs also plays cards about once a week. He enjoys reading, and averages reading one book per week. He also enjoys watching television, and playing with his dog. (R. 51-52)

Hobbs stated he is unable to sleep through the night, and he gets up three or four times. He said, "I usually end up sleeping in my recliner because I'll be in, you know, too much pain in my hip." (R. 52) He has been getting out of bed to sleep in a recliner for ten to fifteen years, explaining:

If you lay flat, I have to have my bed elevated at the head so I sleep on an angle so that the reflux, this is a new word for me, reflux esophagitis [sic]. I guess my esophagus doesn't have a little flapper valve on the bottom of it and food comes back up in my throat so that and the arthritis has, you know, kept me up most nights.

(*Id.*) Hobbs was diagnosed with reflux around 20 years ago. (R. 52-53) He stated he "live[s] on Pepcid." (R. 53) He developed ulcers when he was in college, and has had problems with his stomach. (R. 53-54)

Doctors have told Hobbs not to lift anything heavy because it puts a strain on his heart. He also has problems bending over due to the arthritis in his hip. (R. 54)

Hobbs spent two years in the Army, from 1961 to 1963. He received an honorable discharge. He does not receive any benefits through the VA. (R. 56)

Hobbs has never filed a workmen's compensation claim. He drew disability from an insurance company for six months after his first heart attack. He does not receive any type of public assistance. (R. 56-57)

Hobbs is not currently receiving psychiatric care. In about 1981, he spent a year in therapy at Johns Hopkins, for depression. He continued seeing a psychologist when he lived in Colorado, for four or five months. Since 1993, he has not taken medication for depression. He sought treatment for depression when he first returned to Iowa, but he did not like the therapist and "just quit going." (R. 61)

## ***2. Vocational expert's testimony***

The ALJ asked the following hypothetical question of VE Jack Reynolds:

I'd like you to assume that we're talking about a male who by regulatory definition would be classified as a younger individual with an educational level beyond high school, past relevant work as per exhibit 12E, and, with the following impairments: in here we're talking about cardiovascular disease, status post surgery, history with dizziness, as well as arthritis involved in the right hip, history of digestive difficulty including notation of peptic ulcer disease, as well as treatment for psychiatric symptoms. Now, as a result of this combination of impairments and medication and treatments prescribed the claimant would have the physical and mental capacity to perform work related activities except for the following: in that a maximum lift would not exceed 20 pounds, and repeated maximum would not exceed ten pounds. There would be no more than an occasional requirement to stoop, to kneel, to crawl. There would be no requirement for climbing. Environmental restrictions would also include no exposure to heights or to moving machinery. Environmental restrictions would include no exposures to heat, humidity, cold, dust, fumes or smoke, beyond that which you would find in a commercial office. . . . [B]ased on [this] hypothetical, would the claimant be able to perform past relevant work, either as he performed it or as it's generally performed within the national economy?

(R. 62-63) The VE replied the claimant "would be able to perform both jobs that were listed in his past

work history." (R. 63)

The ALJ then added the following conditions to the hypothetical:

that there be no requirement for a fast paced work in that there would be the ability to perform work occasionally, up to a third of the time on a slow basis. Additionally, the ability to alternate standing and sitting essentially at will. With these additional limitations, would past relevant work be possible?

(*Id.*) The ALJ responded, "I would say the additional limitations of occasional slow pace and alternating positions at will would eliminate his past work." (*Id.*)

Finally, the ALJ asked if the hypothetical claimant would have transferable skills. The ALJ replied, "I don't believe so. . . . I believe with those additional limitations it would eliminate all unskilled work." (R. 63-64)

### ***3. Hobbs's medical history***

A detailed chronology of Hobbs's relevant medical history is attached to this opinion as Appendix A. The court will summarize the medical history briefly here. As noted above, Hobbs claims he is disabled by the combination of several conditions including "[c]oronary heart disease (with history of myocardial [sic] infarction [sic] and bypass surgery), arthritis in right hip and right ankle, right lung is partially collapsed with resultant shortness of breath, depression, obesity (260 lbs. at 5'11"), peptic ulcer, alcoholic (not drinking currently), [and] dizziness." (R. 242) The court will examine the record with respect to each of these conditions.

#### ***a. Heart disease***

The record indicates Hobbs suffers from significant coronary artery disease, dating back to at least 1977. In July 1977, Hobbs underwent right heart catheterization. He suffered a probable myocardial infarction in April 1978. He was admitted to the hospital again in February 1980, complaining of chest pain; however, lab work and a stress test were not indicative of another myocardial infarction.

In February 1986, Hobbs apparently suffered another myocardial infarction while driving through Arizona. He was treated at Kingman Regional Hospital and released with instructions to follow up with his regular doctor when he returned home. Hobbs underwent a double bypass in March 1986, at Humana Hospital Sunrise in Las Vegas, Nevada. His follow-up was overseen by Vincent Runco, M.D., at the Cardiac Center of Creighton University in Omaha, Nebraska. On April 22, 1986, Dr. Runco noted Hobbs had recovered well from the surgery, and "progressively increased his physical activity with no recurrent chest pain." (R. 149) Fourteen months later, on June 2, 1987, Dr. Runco again noted Hobbs was "doing quite well with reference to his cardiac status and has been very active with good exercise tolerance and no recurrent chest pain." (R. 188) Hobbs was experiencing palpitations, and Dr. Runco placed Hobbs on a Holter monitor for 24-hour monitoring.

Dr. Runco saw Hobbs for another follow-up on July 5, 1988, and noted Hobbs was "doing well with

reference to his cardiac status." (R. 190) Hobbs was still having palpitations, which Dr. Runco opined were "probably due to premature ventricular contractions." (*Id.*) The doctor advised Hobbs to take one enteric coated aspirin per day.

Hobbs saw Dr. Runco again on September 3, 1991, for a follow-up evaluation, and he was still "doing well with reference to his cardiac status." (R. 184) A chest X-ray was within normal limits, heart sounds were of good intensity with regular rhythm; and no significant murmurs, gallops, rubs, clicks or other sounds were audible. Hobbs was advised to continue taking his current medications, including one aspirin per day, and to use Tylenol for other aches and pains.

On October 26, 1995, Hobbs was seen by G.R. Jackson, M.D., with complaints of chest pain, which became worse on exertion, and light-headedness. A chest X-ray was within normal limits, and Hobbs was scheduled for a treadmill test. (R. 295, 305) Hobbs saw Dr. Tom T. Hee at the Cardiac Center on November 7, 1995, for an evaluation of Hobbs's chest pain. Hobbs reported he had been doing well since 1991, although he had gained quite a bit of weight. Dr. Hee noted Hobbs "has been active, playing golf and even yesterday he was playing golf and did not have any chest discomfort." The doctor's impression was that Hobbs had a vasovagal reaction,<sup>(1)</sup> and atypical chest pain that might be musculoskeletal in nature. (R. 312-13)

On August 9, 1996, Hobbs was seen by Tom V. Pagano, M.D., at the Cardiac Center, for evaluation of ventricular bigeminy.<sup>(2)</sup> Hobbs reported that previously, "he could have played 36 holes of golf . . . and now he has to use a cart when he plays even 18 holes." (R. 310) Dr. Pagano offered Hobbs heart catheterization, but Hobbs declined because he had no insurance to help pay for the procedure. (R. 311) The doctor opined Hobbs's chest discomfort could be angina. (R. 306) A treadmill test was stopped after 8 minutes and 41 seconds because Hobbs became short of breath and developed some chest pain. (R. 307) Dr. Pagano wrote a letter dated October 21, 1996, in which he opined Hobbs

probably could not be employed in any occupation that required any significant manual labor. The only job he would be eligible for would be some sort of desk job which was not associated with a great deal of stress. In my experience, it would be unlikely that a patient like Mr. Hobbs could be retrained for an occupation such as I described.

(R. 341) Dr. Pagano reiterated his opinion in a letter to Hobbs dated November 11, 1997, in which the doctor stated:

I think you have quite significant coronary artery disease with a history of impaired left ventricular function and suspected significant coronary artery disease. We discussed cardiac catheterization but you were reluctant to consider it because you have no available insurance. Please include this letter with your other records when you are evaluated by the Social Security. I think you have significant heart disease [and] I doubt you could be employed in any meaningful sense or any job requiring any labor or significant stress.

(R. 373)

***b. Obesity; peptic ulcer; shortness of breath***

The record indicates Hobbs has suffered from obesity since at least August of 1996. On May 14, 1997, Hobbs began treatment with Redux. Although there were risks from the medication due to Hobbs's cardiac history, Dr. Pagano felt Hobbs's weight gain put him at worse risk than the medication. Hobbs lost 14 pounds the first month he was on Redux. On August 8, 1997, he reported he felt good and had no physical complaints. (R. 349) At a follow-up exam on September 8, 1997, the doctor noted Hobbs "seems to be doing quite well on his present protocol." (R. 348) He was advised to stop taking the medication on September 15, 1997, when his weight had dropped to at least 251 pounds. (*Id.*; see R. 349)

In addition to problems with his weight, Hobbs has suffered from other gastrointestinal difficulties. In June 1987, Hobbs was diagnosed with marked gastroesophageal reflux. In September 1987, he was diagnosed with a hiatal hernia. Hobbs underwent surgery to repair the hernia on February 16, 1988. A pre-operative chest X-ray revealed some minimal changes in the bases of Hobbs's lungs consistent with atelectasis.<sup>(3)</sup> Follow-up X-rays on July 5, 1988, showed a "questionable nodule in the left upper lung field." (R. 298) However, a chest CT on July 25, 1988, indicated Hobbs's lung fields were clear, with no masses or adenopathy. (R. 297)

Hobbs continued to have gastrointestinal difficulties, and discomfort from gastroesophageal reflux. An air contrast of Hobbs's colon performed on May 3, 1989, was negative, but an upper intestinal endoscopy performed on May 9, 1989, indicated another hiatal hernia, mild gastritis, reflux esophagitis, possible Barrett's esophagus,<sup>(4)</sup> and no evidence of peptic ulceration of the stomach. Hobbs underwent an upper GI series of his small bowel on May 10, 1989, which was largely normal. There was some displacement of the esophagus to the left and some relative narrowing, but the doctor who performed the test indicated, "I really strongly doubt that this is a significant finding." (R. 168)

On May 13, 1989, Hobbs was seen for a follow-up exam to review his reflux symptoms. Doctors recommended a GI workup, but Hobbs declined and chose to continue with conservative management. By October of 1990, the hiatal hernia was still bothering him, and he indicated a desire to have the hernia repaired later in the winter. Nothing in the record indicates Hobbs ever underwent surgery to repair this hernia.

***c. Dizziness***

The record indicates Hobbs began experiencing transient dizzy spells sometime in 1977. A neurological evaluation in April 1978, revealed no abnormalities and failed to determine the cause of the dizziness. (R. 286-87) In May 1978, Hobbs reported passing out while he was driving. Dr. Garred advised Hobbs to quit driving because of the attacks of dizziness. (R. 303-04)

The next entry in the record concerning dizziness occurs thirteen years later, when Hobbs went to an emergency room on February 25, 1991, complaining of dizziness. He was given some medication and told to follow up with his regular doctor. (R. 165-66) In May 1992, Hobbs again complained of dizziness, but doctors at the Cardiac Center thought the dizziness probably was due to the fact that Hobbs was on a "starvation diet" and had not eaten for a long period of time. (R. 178-79) Hobbs complained of dizziness again in December 1992, together with weakness and mild shortness of breath.



All tests were normal, and the doctor opined that Hobbs might suffer from "vestibulitis," presumably referring to a possible inner ear problem. (R. 160-62, 178)

The next reference to dizziness in the record is in an opinion letter dated November 7, 1995, by Tom T. Hee, M.D., of the Cardiac Center, in which Dr. Hee noted Hobbs's "episode of dizziness sounds vasovagal.<sup>(5)</sup>" (R. 312-13) In a physical examination by Dr. Garred on August 9, 1996, Hobbs complained of dizziness in the mornings. Dr. Garred noted Hobbs had bigeminy, and he was scheduled to see a cardiologist the same day. (R. 350)

#### ***d. Depression***

The record simply does not support Hobbs's claim that he is disabled due to depression. There is one entry in the record, on July 11, 1988, indicating Hobbs was "quite depressed." (R. 298) Dr. J.L. Garred, Sr. indicated he would schedule an appointment with a Dr. Brooks, presumably a psychiatrist or psychologist, but no records from a Dr. Brooks or from any other treating psychologist or psychiatrist appear in the record. Two separate Psychiatric Review Techniques concluded Hobbs has no medically determinable mental impairment. (R. 202-10, 323-31) Although Hobbs testified he underwent therapy for a year at Johns Hopkins, no records have been offered from that institution or from any other doctor to substantiate any ongoing diagnosis of depression.

#### ***e. Arthritis in right hip and ankle***

The first reference in the record to arthritis is in the notes of medical consultant Charles H. Gutenkauf, M.D., dated May 6, 1996. Dr. Gutenkauf noted Hobbs "has had some arthritic pain in the right hip and pelvis, but x-rays revealed only mild osteoarthritic changes. [Hobbs] plays golf every day, usually uses a cart. He has had some arthritis in the right knee and ankle, and some calcification of cartilages." (R. 322)

On June 21, 1996, Dr. H. Richard Hornberger performed a Residual Physical Functional Capacity Assessment. He stated Hobbs's allegations of arthritis were not addressed in his assessment, although he noted Hobbs reported being under the care of a chiropractor for hip pain. (R. 340)

No other references appear in the record relating to Hobbs's allegation of disabling arthritis in his right hip and ankle. Moreover, Hobbs's frequent physical activity in the form of playing golf belies his claim that his arthritis is disabling.

#### ***4. The ALJ's conclusion***

The ALJ found Hobbs has not engaged in substantial gainful activity since December 31, 1992, which is his date last insured. He found Hobbs suffers from severe impairments "including coronary artery disease, status post two myocardial infarctions, status post two vessel bypass surgery[ies], peptic ulcer disease, complaints of pain in the right hip and ankle, and obesity" (R. 24, ¶ 3), but none of Hobbs's impairments, singly or in combination, are listed in, or medically equivalent to an impairment listed in, the Regulations. He found Hobbs

had the residual functional capacity to perform work-related activities prior to December 31, 1992 except for lifting more than 20 pounds occasionally or more than 10 pounds repetitively. He could only occasionally stoop, kneel, and crawl and could do no climbing. He should not be exposed to concentrated heat, humidity, or cold temperatures, nor to concentrated dust, fumes, or smoke beyond levels found in a commercial office. [Hobbs] should not work near unprotected heights or moving machinery[.]

(R. 25, ¶ 5) The ALJ held Hobbs's impairments did not prevent him from performing his past relevant work as a franchise sales representative and auto specialty services manager, which jobs did not require the performance of work-related activities precluded by Hobbs's limitations. (*Id.*, ¶¶ 6 & 7)

The ALJ found Hobbs's testimony regarding the severity and intensity of his symptoms to be less than credible. To begin with, the ALJ noted Hobbs alleged a disability due to alcoholism, yet the evidence shows Hobbs "has been abstinent from alcohol for over ten years." (R. 16) Accordingly, the ALJ found Hobbs's alcoholism to have been in remission since at least 1985, and therefore not to represent a severe impairment within the meaning of the Social Security Act. (R. 17) Similarly, although Hobbs alleges an impairment due to a collapsed right lung, there is little to support his claim in the record. The ALJ found no records indicating treatment for a collapsed lung. (*Id.*)

Hobbs's other complaints similarly were found to be less than credible. Significantly, the ALJ noted Hobbs's condition after December 31, 1992 (Hobbs's date last insured) could not be considered in determining whether Hobbs is eligible for benefits. (R. 20) Taking into consideration the record up to that date, the ALJ concluded Hobbs was not under a disability as defined by the Social Security Act, and was not eligible for benefits. (R. 25, ¶ 9)

### ***III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD***

Section 423(d) of the Social Security Act defines a disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is "not only unable to do his previous work but cannot, considering . . . his age, education and work experience, engage in any other kind of substantial gainful work which exists in [significant numbers in] the national economy . . . either in the region in which such individual lives or in several regions of the country." 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *see Kelley*, 133 F.3d at 587-88 (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner must determine whether the claimant is currently engaged in substantial gainful activity. Second, he looks to see whether the claimant labors under a severe impairment; *i.e.*, "one that

significantly limits the claimant's physical or mental ability to perform basic work activities." *Kelley*, 133 F.3d at 587-88. Third, if the claimant does have such an impairment, then the Commissioner must decide whether this impairment meets or equals one of the presumptively disabling impairments listed in the regulations. If the impairment does qualify as a presumptively disabling one, then the claimant is considered disabled, regardless of age, education, or work experience. Fourth, the Commissioner must examine whether the claimant retains the residual functional capacity to perform past relevant work.

Finally, if the claimant demonstrates the inability to perform past relevant work, then the burden shifts to the Commissioner to prove there are other jobs in the national economy that the claimant can perform, given the claimant's impairments and vocational factors such as age, education and work experience. *Id.*; *Hunt v. Heckler*, 748 F.2d 478, 479-80 (8th Cir. 1984) ("[O]nce the claimant has shown a disability that prevents him from returning to his previous line of work, the burden shifts to the ALJ to show that there is other work in the national economy that he could perform.") (citing *Baugus v. Secretary of Health & Human Serv.*, 717 F.2d 443, 445-46 (8th Cir. 1983); *Nettles v. Schweiker*, 714 F.2d 833, 835-36 (8th Cir. 1983); *O'Leary v. Schweiker*, 710 F.2d 1334, 1337 (8th Cir. 1983)).

Step five requires that the Commissioner bear the burden on two particular matters:

In our circuit it is well settled law that once a claimant demonstrates that he or she is unable to do past relevant work, the burden of proof shifts to the Commissioner to prove, first that the claimant retains the residual functional capacity to do other kinds of work, and, second that other work exists in substantial numbers in the national economy that the claimant is able to do. *McCoy v. Schweiker*, 683 F.2d 1138, 1146-47 (8th Cir. 1982) (*en banc*); *O'Leary v. Schweiker*, 710 F.2d 1334, 1338 (8th Cir. 1983).

*Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000) (emphasis added) *accord Weiler*, 179 F.3d at 1110 (analyzing the fifth-step determination in terms of (1) whether there was sufficient medical evidence to support the ALJ's residual functional capacity determination and (2) whether there was sufficient evidence to support the ALJ's conclusion that there were a significant number of jobs in the economy that the claimant could perform with that residual functional capacity); *Fenton v. Apfel*, 149 F.3d 907, 910 (8th Cir. 1998) (describing "the Secretary's two-fold burden" at step five to be, first, to prove the claimant has the residual functional capacity to do other kinds of work, and second, to demonstrate that jobs are available in the national economy that are realistically suited to the claimant's qualifications and capabilities).

In the present case, the ALJ found Hobbs had failed to demonstrate he could not return to his past relevant work, and therefore the ALJ stopped the analysis at step four.

Governing precedent in the Eighth Circuit requires this court to affirm the ALJ's findings if they are supported by substantial evidence in the record as a whole. *Weiler v. Apfel*, 179 F.3d 1107, 1109 (8th Cir. 1999) (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley v. Callahan*, 133 F.3d 583, 587 (8th Cir. 1998) (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, substantial evidence means something "less than a preponderance" of the evidence, *Kelley*, 133 F.3d at 587, but "more than a mere scintilla," *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971); *accord Ellison v. Sullivan*, 921 F.2d 816, 818 (8th Cir. 1990). Substantial evidence is "relevant evidence which a reasonable mind would accept as adequate to support the [ALJ's] conclusion." *Weiler*, 179 F.3d

at 1109 (again citing *Pierce*, 173 F.3d at 706); *Perales*, 402 U.S. at 401, 91 S. Ct. at 1427; *accord Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993); *Ellison*, 91 F.2d at 818.

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account "whatever in the record fairly detracts from" the weight of the ALJ's decision. *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *accord Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213). Thus, the review must be "more than an examination of the record for the existence of substantial evidence in support of the Commissioner's decision"; it must "also take into account whatever in the record fairly detracts from the decision." *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Gavin v. Heckler*, 811 F.2d 1195, 1199 (8th Cir. 1987)). The court, however, does "not reweigh the evidence or review the factual record *de novo*." *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (quoting *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992) (citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *see Hall v. Chater*, 109 F.3d 1255, 1258 (8th Cir. 1997) (citing *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996)). This is true even in cases where the court "might have weighed the evidence differently," *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)), because the court may not reverse "the Commissioner's decision merely because of the existence of substantial evidence supporting a different outcome." *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997).

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.*, 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen*, 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.*, 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.*, 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala*, 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). Under *Polaski*:

The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:

- 1) the claimant's daily activities;
- 2) the duration, frequency and intensity of the pain;

- 3) precipitating and aggravating factors;
- 4) dosage, effectiveness and side effects of medication;
- 5) functional restrictions.

*Polaski*, 739 F.2d at 1322.

#### **IV. ANALYSIS**

Hobbs first argues the ALJ erred in rejecting his subjective complaints of pain and limitations. A careful review of the record indicates Hobbs's coronary artery disease is the most significant of his many claimed ailments, and the one for which Hobbs consistently has sought treatment over the years. However, the court finds the record contains substantial evidence to support the ALJ's conclusion that Hobbs's coronary artery disease was not disabling up to Hobbs's date last insured.

Although the record indicates Hobbs suffers from obesity, gastroesophageal reflux, a possible Barrett's esophagus, and occasional shortness of breath, the court finds nothing in the record to support Hobbs's claim that these ailments, either singly or in combination, are disabling. These ailments do not prevent Hobbs from engaging in exercise in the form of playing golf frequently, and they would not prevent him from working at a light duty, low-stress desk job.

Overall, the record indicates Hobbs suffers from infrequent, unexplained dizzy spells. Although he likely should not drive, nothing in the record suggests Hobbs's dizzy spells are in any way disabling, or would prevent him from engaging in light work.

Finally, as noted above, the record also does not support Hobbs's claim that he is disabled from depression, or from arthritis in his right hip and ankle.

The court finds substantial evidence exists to support the ALJ's conclusion that Hobbs's subjective complaints were less than credible.

Hobbs next complains the ALJ posed an improper hypothetical question to the VE. The Eighth Circuit has held an ALJ's hypothetical question must fully describe the claimant's abilities and impairments as evidenced in the record. *See Chamberlain v. Shalala*, 47 F.3d 1489, 1495 (8th Cir. 1995) (citing *Shelltrack v. Sullivan*, 938 F.2d 894, 898 (8th Cir. 1991)). A hypothetical question is "sufficient if it sets forth the impairments which are accepted as true by the ALJ." *Johnson v. Chater*, 108 F.3d 178, 180 (8th Cir. 1997); *House v. Shalala*, 34 F.3d 691, 694 (8th Cir. 1994). Only the impairments substantially supported by the record as a whole must be included in the ALJ's hypothetical. *Cruze v. Chater*, 85 F.3d 1320, 1323 (8th Cir. 1996) (citing *Stout v. Shalala*, 988 F.2d 853, 855 (8th Cir. 1993)). If a hypothetical question does not encompass all relevant impairments, the vocational expert's testimony does not constitute substantial evidence to support the ALJ's finding of no disability. *Cruze*, 85 F.3d at 1323 (citing *Hinchey v. Shalala*, 29 F.3d 428, 432 (8th Cir. 1994)). A "proper hypothetical question presents to the vocational expert a set of limitations that mirror those of the claimant." *Hutton v. Apfel*, 175 F.3d

651, 656 (9th Cir. 1999).

In *Wiekamp v. Apfel*, 116 F. Supp. 2d 1056 (N.D. Iowa 2000), Chief Judge Mark W. Bennett explained further the requirements for a proper hypothetical question posed to a VE:

"Testimony from a vocational expert is substantial evidence only when the testimony is based on a correctly phrased hypothetical question that captures the concrete consequences of a claimant's deficiencies." *Taylor v. Chater*, 118 F.3d 1274, 1278 (8th Cir. 1997). Although "questions posed to vocational experts should precisely set out the claimant's particular physical and mental impairments, . . . a proper hypothetical question is sufficient if it sets forth the impairments which are accepted as true by the ALJ." *House v. Shalala*, 34 F.3d 691, 694 (8th Cir. 1994) (internal citations, quotation marks, and alterations omitted).

*Roberts v. Apfel*, 222 F.3d 466, 471 (8th Cir. 2000). "The hypothetical need not use specific diagnostic terms . . . where other descriptive terms adequately describe the claimant's impairments." *Warburton [v. Apfel]*, 188 F.3d [1047,] 1050 [(8th Cir. 1999)]. An ALJ is not required to include in a hypothetical question to a vocational expert any impairments that are not supported by the record. *Prosch*, 201 F.3d at 1015. However, where an ALJ improperly rejects the opinion of a treating physician or subjective complaints of pain by the claimant, the vocational expert's testimony that jobs exist for the claimant does not constitute substantial evidence on the record as a whole where the vocational expert's testimony does not reflect the improperly rejected evidence. *See Singh*, 222 F.3d at 453 ("In view of our findings that the ALJ improperly rejected both the opinion of Singh's treating physician and Singh's subjective complaints of pain, we find that the hypothetical question posed to the vocational expert did not adequately reflect Singh's impairments. Accordingly, the testimony of the vocational expert that jobs exist for Singh cannot constitute substantial evidence on the record as a whole.").

*Wiekamp*, 116 F. Supp. 2d at 1073-74.

In the present case, it first should be noted the ALJ was not required to rely on a VE's opinion at all. The ALJ found Hobbs could return to his past relevant work at step four of the evaluation process. Thus, the burden of proof never shifted to the Commissioner to show Hobbs retained the residual functional capacity to do other kinds of work. *See Nevland, supra.*<sup>(6)</sup> Nevertheless, the ALJ did pose a hypothetical question to the VE that considered all the impairments Hobbs claims. The hypothetical included limitations arising from "cardiovascular disease, status post surgery, history with dizziness, as well as arthritis involved in the right hip, history of digestive difficulty including notation of peptic ulcer disease, as well as treatment for psychiatric symptoms. (R. 62-63) Given those limitations, some of which the ALJ found not to be credible, the VE found Hobbs could return to his past relevant work. The court finds the ALJ's hypothetical fully described Hobbs's impairments.

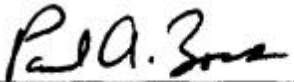
Finally, it is significant to note, once again, that the ALJ's opinion only considered Hobbs's impairments up to the date last insured. This is not to say Hobbs's condition has not worsened over the years, or that he may not currently be entitled to benefits. However, that is not the question before the court. The court finds the record contains substantial evidence to support the ALJ's conclusion that Hobbs was not disabled at any time through December 31, 1992.

## V. CONCLUSION

The decision of the Commissioner is **affirmed**, and judgment shall enter in favor of the Commissioner and against Hobbs.

**IT IS SO ORDERED.**

**DATED** this 21st day of March, 2002.

  
\_\_\_\_\_  
PAUL A. ZOSS  
MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT

1. A vasovagal attack is "a transient vascular and neurogenic reaction marked by pallor, nausea, sweating, bradycardia, and rapid fall in arterial blood pressure which, when below a critical level, results in loss of consciousness and characteristic electroencephalographic changes. It is most often evoked by emotional stress associated with fear or pain." *Dorland's Illustrated Medical Dictionary*, 167 (27th ed. 1988).
2. "Bigeminy" means "the condition of occurring in pairs; especially the occurrence of two beats of the pulse in rapid succession[.]" *Dorland's Illustrated Medical Dictionary*, 204 (27th ed. 1988).
3. "Incomplete expansion of a lung or a portion of a lung," or a collapsed lung. *Dorland's Illustrated Medical Dictionary*, 161 (27th ed. 1988).
4. Also called Barrett's syndrome, this indicates a "peptic ulcer of the lower esophagus, often with stricture[.]" *Dorland's Illustrated Medical Dictionary*, 1630 (27th ed. 1988).
5. See note 1, *supra*.
6. But see *McPherson v. Apfel*, 110 F. Supp. 2d 1162, 1170-71 n.2 (N.D. Iowa 2000), in which Chief Judge Mark W. Bennett suggests "certain decisions of the Eighth Circuit Court of Appeals suggest that the burden shifts to the Commission at *step four*[,] which Judge Bennett found "makes sense." (Citing *Scott v. Apfel*, 89 F. Supp. 2d 1066(N.D. Iowa 2000.)